Supreme Court, U.S.
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DEC 19 1988

No. 88-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JULIA McCAIN LAMPKIN ASAM, Ph.D., J.D.
Plaintiff/Appellant

vs.

ROBERT J. SHAPIRO
Defendant/Appellee

APPEAL FROM THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT

MOTION TO DISMISS/OR AFFIRM FROM FEDERAL COURT

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(Long Arm Statute)

IN THE

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No. 88-836

In re Robert J. Shapiro, *Appellee*

MOTION TO DISMISS/OR AFFIRM FROM FEDERAL COURT

Appellee, in the above title case moves to dismiss (and/or affirm) on the grounds that the appeal and questions presented therein concern matters so unsubstantial as to need no further argument. Appellee would state that the questions presented are unsubstantial, there is an absence of any conflicts of opinions within the case, the decision of the courts below is obviously correct and, therefore, no further review is warranted.

STATEMENT OF FACTS

This action involves a suit for legal malpractice brought by Appellant against Appellee. The underlying case in this action pertained to a suit against the Lee County School Board as a result of her termination in 1978. Subsequent disputes arose between Appellee and Appellant with respect to the Appellee's representation of the Appellant in her action against the Lee County School Board. In November 1984, after several demands had been made by the Appellee upon the Appellant for further retainer in order to fully prosecute the case, Appellee made Motion to Withdraw from the case. Said Motion was granted and Appellee withdrew as attorney of record. Appellant received ninety (90) days continuance in order to obtain new counsel, and subsequently prosecuted the case per se. Appellant did not prevail in prosecuting the case, and subsequently on October 30, 1986, brought action charging Appellee with breach of contract, fraud, and

negligence. On November 6, 1987, Appellee made Motion for Summary Judgment in this case. Appellee contended that there were no issues of genuine fact left to be resolved and, therefore, as a matter of law Summary Judgment should be granted. On December 21, 1987, Appellee's Motion for Summary Judgment was granted by the Honorable Elizabeth Kovachevich in the United States District Court, Middle District of Florida, Tampa Division. Judge Kovachevich found that as a matter of law there were no genuine issues of material fact, which were left to be resolved that would preclude a Summary Judgment.

The Honorable Elizabeth Kovachevich cited *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) for the proposition that Federal Rule Civil Procedure 56(c) mandated the entry of a Summary Judgment after adequate time for discovery had gone forth, and that there was a failure on part of one of the parties to establish existence of an element essential to their case. The Honorable Judge examined all issues with respect to the case, and determined that there were no genuine issues of material fact which would preclude a Summary Judgment with respect to issue of negligence on the part of Appellee, the issue of fraud on the part of the Appellee, the issue of breach of contract of the Appellee and a breach of fiduciary duty on the part of the Appellee. Final Summary Judgment was granted.

Appellant appealed Judge Kovachevich's opinion to the Eleventh Circuit Court of Appeals and said decision by the Middle District of Florida was per curiam affirmed without written opinion on August 24, 1988.

ARGUMENT

Appellant has presented no substantial federal question for which Appellate or certiorari review should be granted. Furthermore, two lower courts have concurred in the opinion that there is no genuine issue of material fact which would have precluded a Summary Judgment in this case, and the decisions of the courts below are obviously correct and, therefore, this case warrants no further review.

Appellant has attempted to raise three questions in her Jurisdictional Brief which would support her Appeal/Writ of Certiorari in the above mentioned case and requested an extraordinary writ with respect to a fourth issue. The questions presented by Appellant are respectfully rephrased by this Appellee as:

1. Whether Appellant's Fifth Amendment rights under the Constitution were violated when district court and circuit court both concurred that there were no genuine issues of material fact, which would preclude Summary Judgment in this case.

2. Whether Appellant's Seventh Amendment rights under the United States Constitution were violated when both district court and circuit court below pursuant to Rule 56(c) Federal Rules of Civil Procedure determine that there were no genuine issues of material fact and, therefore, granted Summary Judgment in this matter precluding a trial by jury on Appellant's issues.

3. Whether the refusal by the Northern District of Alabama court to grant jurisdiction under the State of Alabama's Long-Arm Statute constituted a decision wherein Alabama's long-arm statute was held invalid and unconstitutional.

4. Whether an extraordinary writ should be issued to force the court below the supplement the record as requested by Appellant in Case No. 88-3026.

Appellants argument with respect to a violation of her Fifth Amendment rights is non-substantial and without merit.

With respect to the first issue presented by Appellant that her Fifth Amendment Due Process rights were violated when the

courts below granted Summary Judgment in this matter, Appellee would respectfully cite that there is no substantial federal question presented by Appellant in this matter and, furthermore, the decisions of the court below were correct and, therefore, should be affirmed. Appellant has stated that courts below did not rule according to law when they granted Summary Judgment, because of Rule 56(c) Federal Rules of Civil Procedure. Under Rule 56(c), Appellee was entitled to a Summary Judgment upon a showing that there were no genuine issues of material fact. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by a jury, but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

The United States District Court for the Middle District of Florida in a well written opinion ruled that there were no genuine issues of material fact and, therefore, Appellee was entitled as a matter of law to a Summary Judgment in this matter. Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut but, rather, as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. Since there were no genuine issues of material fact to be resolved, it was proper for that trial court to grant Summary Judgment. *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation,* 475 U.S. 574 (1986). *Celotex Corp. v. Catrett,* 477 U.S. at 327. Appellant's contention that due process was denied under her Fifth Amendment constitutional rights, therefore, is without merit. Appellant's further statement that the Eleventh District Court did not read the record upon Appeal is unsupported and, therefore, without merit.

This Court has held that it would not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Beronyi v. District Director, Immigration and Naturalization Service,* 385

U.S. 630 (1967); *Pick Manufacturing Company v. General Motors Corp.*, 299 U.S. 3 (1936); *Graver Tank & Manufacturing Company v. Linde Air Products Company*, 336 U.S. 271 (1949). Two courts have reviewed this case and determined that Summary Judgment was appropriate and, therefore, the question presented by the Appellant is unsubstantial and does not warrant review by this court.

Appellant's Seventh Amendment rights were not violated by the granting of a Summary Judgment.

Appellant's contention that her Seventh Amendment right to a trial by jury has been violated through issuance of a Summary Judgment is also without merit. Rule 56(c) Federal Rules of Civil Procedure specifically allows the granting of Summary Judgment when there are no genuine issues of material fact. Furthermore, this Court held that there is no right in a civil case to a trial by jury, unless and except so far as there are issues of fact to be determined. *In re Peterson*, 253 U.S. 300 (1920). Thus, where Summary Judgment procedure is appropriate, no jury trial is warranted.

Alabama's Long-Arm Statute was not deemed unconstitutional in the court below and Appellants argument is without merit.

With respect to the third issue presented by Appellant as to whether the refusal by the Northern District of Alabama court to grant jurisdiction under the State of Alabama's Long-Arm Statute was invalid, Appellant has previously attempted to, through Writ of Mandamus number 390 in the Supreme Court, obtain review by this Honorable Court. This attempt pertained to a ruling by Honorable Sam C. Pointer, U.S. District Judge in the U.S. District Court for Northern Alabama refusing to grant Alabama Long-arm jurisdiction to this case and transferring the case to the Middle District of Florida for consideration. Judge Pointer specifically found that the minimum contacts required by the Alabama Long-arm Statute were not present and, therefore, long-arm jurisdiction was not appropriate. Nowhere in Judge Pointer's opinion is there any ruling that the Alabama

Long-arm Statute is repugnant to the Constitution, or that the Alabama Long-arm Statute is unconstitutional, therefore, review of by this Court on that issue is unsubstantial, has previously been ruled on, and does not warrant further review. Indeed, that the formal pronouncements of this Court upon causes submitted to it should enjoy every possible degree of finality and conclusiveness would seem to be a necessary predicate to the proper functioning of the Court itself.

Appellant's request for an Extraordinary Writ should not be granted because Appellant's argument is non-substantial.

With respect to Appellant's attempts by extraordinary writ to have this Court review the opinion below that her Motion to Supplement the Record would not be granted, this Motion is without merit. Federal Rules of Appellate Procedure 10(e) dealing with modification of the record, does not give a court the authority to admit on appeal a document, file, or series of papers which were neither introduced into evidence nor made part of the record in the trial court.

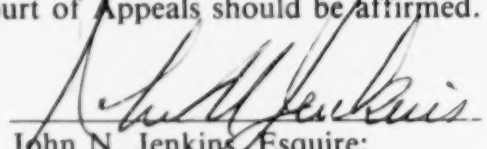
Under Federal Rules of Appellate Procedure 10(e) as to modification of the record, the Appellate Court has discretion upon determination of whether or not the suggested items to supplement the record are material to either party and are necessary to complete the record. Appellant's record upon Appeal was complete without the inclusion of the Supreme Court Writs of Mandamus for which she requested supplementation of the record. This Court has held that such extraordinary writs as requested here are reserved for only extraordinary causes. *Platt v. Minnesota Mining & Manufacturing Company,* 376 U.S. 240 (1964). Such a writ is to be used only in an exceptional case where there is a clear abuse of discretion or usurpation of judicial power. *LaBuy v. Howes Leather Co.,* 352 U.S. 249 (1957). Therefore, since said ruling was discretionary with the Eleventh Circuit of Appeals, and since no abuse of discretion has been shown, no extraordinary writ should be granted.

Lastly, Appellee respectfully cites that the Supreme Court of the United States does not try facts of cases de novo. *United*

States v. E.I. DuPont De Nemours & Co., 351 U.S. 377 (1956). Further, on review of Summary Judgment, this Court has noted that it is not the function of this Court to speculate as to ultimate findings of fact. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969). Since this case turns merely on an appraisal of evidence and does not involve an issue of importance to the operation of the Federal system, Appellee respectfully contends that certiorari should not be granted.

CONCLUSION

For these reasons the Petition for Writ of Certiorari/Request for Appeal should be dismissed or, in the alternative, the opinion of the Eleventh Circuit Court of Appeals should be affirmed.



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